Supreme Court, U. S.
FILED
DEC 21 1978
MICHAEL RODAK, JR., CLERK

No. 78-857

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

YESHIVA UNIVERSITY,
Respondent.

BRIEF OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WOODLEY B. OSBORNE
1 Dupont Circle, N.W.
Washington, D.C. 20036

Attorney for American Association of University Professors
Amicus Curiae

WILSON · EPES PRINTING CO., INC. · 789-0096 · WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS	1
STATEMENT	3
REASONS FOR GRANTING THE PETITION	4
CONCLUSION	18
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases: Page

Adelphi University, 195 N.L.R.B. 639 (1972) 5, 17
Bell Aerospace Co., On remand, 219 N.L.R.B. 384 (1975) 8, 9, 12
Brewery Workers v. *NLRB*, 298 F.2d 297 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 843 (1962) 14
Cornell University, 183 N.L.R.B. 329 (1970) 4
Ford Motor Co., 66 N.L.R.B. 1317 (1946) 8
Fordham University (I), 193 N.L.R.B. 134 (1971) .. 5
Fordham University (II), 214 N.L.R.B. 971 (1974) 5
General Dynamics Corp., 213 N.L.R.B. 851 (1974) 12
Illinois State Journal Register v. *NLRB*, 412 F.2d 37 (7th Cir. 1969) 8, 17
Mourning v. *NLRB*, 559 F.2d 768 (D.C. Cir. 1977) 17
New York University, 205 N.L.R.B. 4 (1973) 5
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) .. 8
NLRB v. *Security Guard Service*, 384 F.2d 143 (5th Cir. 1967) 13
Northeastern University, 218 N.L.R.B. 247 (1975) 5
Retail Clerks International v. *NLRB*, 366 F.2d 642 (D.C. Cir. 1966) 8
Stop & Shop Companies, Inc. v. *NLRB*, 548 F.2d 17 (1st Cir. 1977) 13
Trustees of Boston University v. *NLRB*, 575 F.2d 301 (1st Cir. 1978), *petition for certiorari pending*, No. 78-67 2
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 4
University of Miami, 213 N.L.R.B. 634 (1974) 5
Western Electric Co., 100 N.L.R.B. 420 (1952) 16
Westinghouse Electric Corp., 97 N.L.R.B. 127 (1952) 12
Westinghouse Electric Corp., 113 N.L.R.B. 337 (1955) 11

TABLE OF AUTHORITIES—Continued

Statutes: Page

United States Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

Section 2(11), 29 U.S.C. § 152(11) 7, 8
Section 2(12), 29 U.S.C. § 152(12) 11
Section 9(c)(3), 29 U.S.C. § 159(c)(3) 7

State Statutes:

Conn. P.A. 566, L. 1975, §§ 1-11 5
Minn. Stat. §§ 179.61-179.76 (1976 Supp.) 5
N.J. Stat. §§ 34:13A-1 - 34:15A-11 (1976 Supp.) 5
Pa. Stat. tit. 43, §§ 1101.101-1101.2301 (1976 Supp.) 5

Miscellaneous:

Academic Collective Bargaining Information Service, Special Report No. 12, Update, April, 1978.. 4
The Chronicle of Higher Education, June 26, 1978.. 4
Finkin, *The Supervisory Status of Professional Employees*, 45 Fordham L. Rev. 805 (1977) 10, 12
Hearings on Amendments to the National Labor Relations Act Before the House Comm. on Education and Labor, 80th Cong., 1st Sess. (1947).. 12
Hearings on S. 55 and S.J. Res. 22 Before Senate Comm. on Labor and Public Welfare, 80th Cong., 1st Sess. (1947) 12
T. Hungate, MANAGEMENT IN HIGHER EDUCATION (1964) 9
H. Mason, COLLEGE AND UNIVERSITY GOVERNMENT (Tulane Studies in Political Science, Vol. XIV, 1972) 10
Rules and Regulations, National Labor Relations Board 7
S. Rep. No. 105, 80th Cong., 1st Sess. (1947) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-857

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

YESHIVA UNIVERSITY,
Respondent.

BRIEF OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTEREST OF AMICUS *

The American Association of University Professors is a national professional organization of teachers and research scholars in all disciplines at accredited colleges and universities in the United States. It has approximately 1350 chapters and over 75,000 members in such institutions.

---

* All parties have consented to the filing of this Brief.

A substantial and growing number of the Association's chapters are, with the encouragement and support of the Association, engaged in collective bargaining with the administrations and governing boards of institutions of higher education. A substantial portion of the Association's resources are each year allocated to the support of Association chapters engaged in efforts to organize and engage in collective bargaining under the provisions of the National Labor Relations Act.

If a faculty's collective role in governance matters can deprive it of the protections of the National Labor Relations Act, as held by the court below, both of these activities are threatened. The legal status of ongoing collective bargaining relationships between faculty unions and the administrations and governing boards of privately supported institutions of higher education will remain uncertain if the decision below stands, as will the organizational rights of faculty generally.

The Association's chapter is a party in *Trustees of Boston University* v. *NLRB*, 575 F.2d 301 (1st Cir. 1978), *petition for certiorari pending*, No. 78-67.

STATEMENT

This case reached the court below on the petition of the National Labor Relations Board to enforce its order requiring Yeshiva University to recognize and bargain with the Yeshiva University Faculty Association, which had decisively won a Board-supervised collective bargaining election. The validity of the Board's underlying unit determination decision was challenged by the University. Relying on its conclusion that the faculty at Yeshiva "are, in effect, substantially and pervasively operating the enterprise" (Pet. App. A, 27a), the court of appeals refused to enforce the Board's order. In short, it found that Yeshiva's faculty are managerial or supervisory employees and as such not entitled to the protections of the National Labor Relations Act ("the Act").

Analyzing the governance patterns at each of ten divisions of the University, the court found that the faculty, operating through committees sometimes chaired by administrators and sometimes not,[1] regularly make recommendations to the University administration in a number of important areas: matters relating to the appointment, reappointment, promotion and tenure of their faculty colleagues, curriculum matters, the establishment or revision of admission and degree requirements, grading standards, and, in some cases, tuition levels.[2] The court further found that these faculty recom-

[1] The University's structure and the nature of the faculty's participation in certain matters of University governance are more fully described in the Board's Petition. (Petition, pp. 2-13)

[2] The court of appeals' treatment of these factual issues is illustrated by its findings with regard to the faculty role in tuition matters. The court found that "in particular cases . . . the tuition to be charged [is] *controlled* by the full-time faculty." (Emphasis supplied.) (Pet. App. A, 23a) This finding was based on a single incident in which the Acting Dean of one of Yeshiva's divisions recommended a $500 increase in tuition which was rejected in favor of a

mendations were usually accepted by the University's administration or governing board. The court concluded from these findings that the "full-time faculty [at Yeshiva], acting at times through committees or department chairmen, and at other times as a body, exercises supervisory and managerial functions as defined by section 2(11) of the Act, and within the Board's prior holdings as discussed in *NLRB* v. *Bell Aerospace Co., Division of Textron, Inc.*" (Pet. App. A, 21a-22a)

REASONS FOR GRANTING THE PETITION

1. The decision below, in holding that faculty participation in matters of academic governance renders them managerial or supervisory employees, throws into question the status of a substantial number of existing bargaining relationships between faculty and the administrations and governing boards of privately supported institutions of higher education. Since the Board first asserted jurisdiction over private higher education, *Cornell University*, 183 N.L.R.B. 329 (1970), the faculties of seventy-seven such institutions have organized and entered into formal bargaining relationships with their administrations and governing boards,[3] relying on this

$300 increase supported by the faculty. *Cf.* Petition, p. 11. Similar inferences are drawn by the court of appeals throughout its opinion. The court's ultimate inference that the Yeshiva faculty are "operating the enterprise" is based on nothing more than facts showing that faculty advice on a variety of important matters is widely accepted by higher authority. We show below that the legal conclusions drawn by the court are incorrect. But we also believe that in its treatment of the record the court plainly overreached its authority under the "substantial evidence" test, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

[3] The Chronicle of Higher Education, June 26, 1978, p. 8. See also Academic Collective Bargaining Information Service, Special Report No. 12, Update, April, 1978. In addition, the faculties of more than 500 state supported institutions of higher education are organized and currently engaged in collective bargaining under state enacted public sector bargaining laws. *Id.* Most of these state

extension of jurisdiction and on the Board's successive rejection of the argument—accepted below—that faculty are not covered employees.[4]

The decision below, relying on evidence that the faculty at Yeshiva University participated in governance matters in a fashion similar to—or at least apparently similar to—that contemplated by many existing labor agreements, held these faculty to be managerial or supervisory employees and hence not entitled to engage in collective bargaining except with the consent of their governing board. If this decision is not reviewed by the Court, the status of those faculties already organized—in some cases for substantial periods of time—and the agreements they have negotiated will remain legally uncertain. To the extent these faculties have been successful in incorporating into their labor agreements their substantial participation in matters of academic governance,[5] they may also have converted themselves into supervisory or

laws are modeled on the National Labor Relations Act. See *e.g.*, Conn. P.A. 566, L. 1975, §§ 1-11; Minn. Stat. §§ 179.61-179.76 (1976 Supp.); N.J. Stat. §§ 34:13A-1 - 34:13A-11 (1976 Supp.); Pa. Stat. tit. 43, §§ 1101-101 - 1101.2301 (1976 Supp.)

[4] The Board has repeatedly rejected the contention that the faculty role in governance matters ousts them from coverage by the Act. See, *e.g.*, *Adelphi University*, 195 N.L.R.B. 639 (1972); *New York University*, 205 N.L.R.B. 4 (1973); *Fordham University (I)*, 193 N.L.R.B. 134 (1971); *Fordham University (II)*, 214 N.L.R.B. 971 (1974); *University of Miami*, 213 N.L.R.B. 634 (1974); *Northeastern University*, 218 N.L.R.B. 247 (1975).

[5] In the Appendix to this Brief we have set forth, in summarized form, the provisions of twenty collective bargaining agreements negotiated by faculty unions at privately supported institutions of higher education. As the Appendix demonstrates, the collective bargaining agreements negotiated by faculty generally provide for extensive faculty involvement in decisions relating to the appointment, reappointment, promotion and tenure of their colleagues. Many agreements also establish procedures for faculty participation in decisions relating to matters of educational policy: the setting of the curriculum, the establishment of degree and admission requirements, budgetary matters, long-range planning, and the formulation of capital improvement plans.

managerial employees no longer entitled to engage in collective bargaining under the Act. The disruptive—and indeed ironic—impact of such a result is obvious and ought not be countenanced absent review by this Court. Moreover, the circumstance that a growing number of faculties, at Yeshiva and elsewhere, have found it necessary or appropriate to bargain for an assured and often enhanced measure of participation in governance matters is manifestly at odds with any assertion that they are managerial employees.

2. The decision below imposes on the Board and on faculty employed at privately supported institutions of higher education a legal standard which is impossible to administer and which will inevitably result in unstable relations between faculties and the administrations and governing boards at such institutions. The decision below rests not only on a finding of faculty participation in matters of academic governance, but also upon a finding of broad acquiescence in faculty recommendations on the part of the administration and governing board of Yeshiva. Coupling these two findings, the court below concluded that the faculty are effectively managing the institution.

But the degree of participation and the degree of acquiescence can vary widely from time to time, from institution to institution, and from issue to issue. These inevitable variations—if the decision below stands—can have a decisive effect on the rights of faculty to engage in collective bargaining under the NLRA, not on the basis of an evenly applicable rule of law, but rather on the basis of shifts in the climate of institutional relationships. The burden this will place on the Board and the parties is obvious. For it will be impossible to determine, absent a complex fact-finding process, whether the faculty are covered employees. Such a determination, if the decision below stands, will depend on an assessment of the

extent of faculty participation in governance matters and the degree to which an institution's administration and governing board abide by faculty recommendations.

It is perfectly possible, given the energy of the participants, for the Board, consistent with the rationale of the court below, to come to opposite conclusions regarding faculty bargaining rights on successive election petitions filed by the same faculty at the same institution.[6] It could well be that a new administration or newly configured governing board could choose to dispense with the faculty advice which had largely governed the actions of their predecessors. In such event, even assuming the validity of the decision below, the institution could no longer claim managerial or supervisory status for its faculty. The lively possibility of so untoward a result is reason enough for this Court's review.

3. The role of the faculty in the affairs of Yeshiva University does not warrant a finding of managerial or supervisory status as a matter of law. This is so although there can be no doubt that the patterns of governance that characterize many of this country's institutions of higher education, apparently including Yeshiva University, are markedly different from the generally more hierarchical structure of the typical industrial enterprise governed by the Act. As we show more fully below, these differences cannot serve to support a finding that faculty members are "supervisors" as that status is defined in section 2(11) of the Act,[7] or that they are

[6] The Act bars the conduct of a collective bargaining election within twelve months of another election held within the same unit. § 9(c)(3), 29 U.S.C. § 159(c)(3). Other than this time bar there appear to be no significant impediments to the filing of a new election petition after an earlier petition has been dismissed. See Subpart C, Rules and Regulations, National Labor Relations Board.

[7] A supervisor is defined by the Act as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other

managerial employees as defined by the Board, by the courts of appeals, and by this Court in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974).[8] The decision below is, accordingly, legally incorrect. Since it overrules a long line of Board decisions, pursuant to which a substantial number of bargaining relationships have been established,[9] it raises important questions regarding the administration of the Act which warrant this Court's review.

a. In many colleges and universities the faculty participate in what are generally described as matters of academic governance (matters of faculty status, curriculum, degree and admission requirements, and other matters of educational policy), though the extent of this participation and its impact on higher education manage-

---

employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in conjunction with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Sec. 2(11), 29 U.S.C. Sec. 152 (11)

[8] The Act itself does not mention managerial employees. They are, however, excluded from the Act's definition of covered employees as a matter of Board law, which has been confirmed by the courts. The Board has defined managerial employees as

> those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy . . . [M]anagerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather it is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management. *Bell Aerospace Co., On remand*, 219 N.L.R.B. 384 (1975)

See also, Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946); *Retail Clerks International* v. *NLRB*, 366 F.2d 642, 645 (D.C. Cir. 1966); *Illinois State Journal Register* v. *NLRB*, 412 F.2d 37 (7th Cir. 1969); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 286-287 (1974).

[9] See notes 3 and 4, *supra*, pp. 4 and 5.

ment varies widely. However, whatever its extent, the *character* of this activity is not analogous to the type of authority which has been held in other contexts to result in supervisory or managerial status.

Unlike the statutory supervisor or the managerial employee, the influence of a college or university faculty derives not from being "aligned with management" (*Bell Aerospace Co., On remand, supra*, note 8) or from any express authority delegated by management to all or part of the faculty. Rather it derives from the faculty's professional expertise and from the nature of management's necessary reliance on them for the competent delivery of the institution's unique "service," the teaching of students and the general advancement of knowledge through research and publication.

It would be unnatural for higher education management to confine their reliance on faculty to the competent performance of their primary responsibilities in the classroom, laboratory or library. For most important decisions of educational policy and faculty status require an understanding of what goes on in those areas, an understanding which is uniquely possessed by the faculty. The implications of this fundamental proposition are widely recognized. As the former Controller of Teachers College, Columbia University, observed, "the board [of trustees] in fulfilling its responsibilities for management, requires the aid of the faculty . . . because the Board does not, unaided, possess the best judgment on all matters involved." T. Hungate, MANAGEMENT IN HIGHER EDUCATION 66-67 (1964). To similar effect is a leading study of academic governance:

> Decision-making in the university must involve the teacher-researcher "on the assembly line" because he chiefly knows intimately what the "production" of the university is all about; it is his immediate proximity to the personal tensions of learning and scholarly creation which give legitimacy to much of the

> decision-making for the academic community. H. Mason, College and University Government, 1 (Tulane Studies in Political Science, Vol. XIV, 1972).

Moreover, faculty themselves are frequently vigorous, as are many professionals,[10] in insisting on the preservation of their influence over the governance of their institution sufficient to insure that they are able to function as freely and effectively as possible. The best evidence of this, in the context of the current dispute, lies in the results of the collective bargaining which has been carried out in higher education. As the Appendix demonstrates, faculty labor agreements consistently provide for considerable faculty participation in faculty status decisions and in other matters of academic governance as well.

In short, a faculty's influence on the governance of its institution flows from its professional expertise and from the fact that faculty expertise is what the institution produces. The degree of faculty influence depends upon the extent of management's recognition that reliance on faculty judgment is appropriate or necessary, and from the faculty's frequently vigorous insistence that its judgments be heeded—an insistence that is increasingly being institutionalized through collective bargaining.

b. The Act does not contemplate that the tendering of advice to management renders the advisors supervisors or managerial employees, even when the advice is over "hire and fire" decisions, or other policy matters of central importance to the employer, and even when the advice is generally followed. Nor is it contemplated that a group of employees whose advice management has decided or agreed to solicit and frequently follow shall be

[10] For a thorough treatment of the interrelationships between the supervisory exclusion and professional employment, see Finkin, *The Supervisory Status of Professional Employees*, 45 Fordham L. Rev. 805 (1977).

excluded from the Act's protections either on the strength of section 2(11) or under the Board's definition of managerial employees. Professional employees, who commonly make recommendations on important matters to their employer, are as a class explicitly covered by the Act.[11] As the Board held in *Westinghouse Electric Corp.*, 113 N.L.R.B. 337, 339-40 (1955):

> While manufacturing engineers make recommendations on matters which are of great importance to management, that factor is usually present in the work of all professional employees, and does not in and of itself make them part of management so as to preclude their inclusion in a professional unit. Indeed, this common factor, in our opinion, was one of the reasons why Congress specifically provided for the establishment of separate professional units. To justify the exclusion of individuals otherwise qualified for inclusion in a professional unit upon the ground that they are too closely allied to the Employer to be regarded as employees under the Act, we believe that *it must be established that the individuals in question have interests and duties not*

[11] Section 2(12) of the Act defines professional employees as "(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (b) any employee, who (i) had completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)." Sec. 2(11), 29 U.S.C. Sec. 152(12).

shared by the other professionally engaged employees. (Emphasis supplied)[12]

Plainly, something more than a high degree of influence on management is required to make an employee "managerial." As this Court has stressed, "the question whether particular employees are 'managerial' must be assessed in terms of the employees' actual job responsibilities, authority and *relationship to management.*" *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 262, 290, n. 17. (Emphasis supplied.) The relationship must be sufficiently close as to render such employees "aligned with management as [its] true representatives." *Bell Aerospace Co., On remand, supra,* note 8.

A close relationship with management is also a central ingredient of the supervisory exclusion. In addition to listing the discrete functions which evidence supervisory status, section 2(11) contains the overarching requirement that the exercise of such functions be the product of "authority" to act "in the interest of the employer." In other words, in order for an individual to be held a supervisor, he must "(1) have authority (2) to use independent judgment (3) in performing such supervisory

[12] See also *Westinghouse Electric Corp.*, 97 N.L.R.B. 1271, 1272 (1952), where the Board, after noting that the Employer's "methods engineers" make "no individual policy decision[s] on a policy level," held that "mere participation in conferences of supervisory personnel from which emerge some decisions based in part upon . . . recommendations [of the methods engineers] does not give . . . managerial status [to those engineers]." See also, *General Dynamics Corp.*, 213 N.L.R.B. 851, 857-858 (1974). These Board decisions seem plainly consistent with the intent of Congress, which, in extending the Act's coverage to professional employees, rejected emphatic urgings that professional employees ought be excluded as managerial or supervisory employees. Hearings on Amendments to the National Labor Relations Act Before the House Comm. on Education and Labor, 80th Cong., 1st Sess. 1225 (1947); Hearings on S. 55 and S.J. Res. 22 Before Senate Comm. on Labor and Public Welfare, 80th Cong., 1st Sess. 694 (1947). And see, Finkin, *The Supervisory Status of Professional Employees, supra.*

functions (4) *in the interest of management.*" *NLRB* v. *Security Guard Service*, 384 F.2d 143, 147 (5th Cir. 1967) (Emphasis supplied). There must be "[s]ome kinship to management, some emphatic relationship between employer and employee . . . before the latter becomes a supervisor for the former." *Id.* at 149.[13]

It is clear then that both supervisory employees and managerial employees are to be management's representatives. In the case of supervisory employees they must, in addition, perform one or more of the functions enumerated in section 2(11). In the case of managerial employees they must "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Bell Aerospace Co., On remand, supra,* note 8.

c. The court below rejected the Board's conclusion that any authority exercised by the faculty was exercised in its own behalf rather than "in the interest of the employer." At bottom, the court's holding in this regard is based simply on its finding that the University's administration and governing board frequently concurred in faculty recommendations, thereby belying any "divergence" of interest. (See Pet. App. A, 34a, 36a) But nothing in the law requires that the interests of

[13] See *Stop & Shop Companies, Inc.* v. *NLRB*, 548 F.2d 17, 19 (1st Cir. 1977):

> "The reason for excluding supervisors is that they must be representatives of the interests of their employer vis-a-vis other employees. . . . To put the issue in homely terms, do the other employees feel, assuming the alleged supervisor is one who reasonably respects his duties, 'Here comes that so-and-so, get to work,' or is he, basically, but one of the gang who merely gives routine instructions?"

The legislative history of section 2(11) also supports this required "kinship to management." The Congressional intent in enacting the supervisory exclusion was to exclude only those employees who are "truly supervisory" or who are a part of the "front line of management." S.Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947).

employees be literally divergent from those of their employer before they are entitled to the protections of the Act. *Cf. Brewery Workers* v. *NLRB*, 298 F.2d 297, 303 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 843 (1962). ("The entire work force from the president down to the messenger boy in one sense acts in the interest of the employer, as Congress well knew. Surely it contemplated some other test than is afforded by a sheerly literal reading of section 2(11).")

Faculty do not meet the requirements for supervisory or managerial status. They are not "aligned with management," nor are they accountable to management except in the performance of their teaching and research functions. The court below recognized this when it noted that "most university faculties enjoy a state of *independence* and influence on policy which is 'entirely unknown among the professionals in private industry.'" (Pet. App. A, 28a) (Emphasis supplied. Citation omitted.) But the court below missed the import of this unusual "independence" from management. Rather than perceiving that it refutes any claim that the faculty are "aligned" with their administration and governing board, the court held instead that faculty could not be analogized to professionals in industry simply because their "independence and influence" are so much greater. (Pet. App. 27a-28a) In reaching this conclusion the court looked in the wrong direction. There is no doubt that a professional employee, partly due to his professional expertise, may become so implicated in the management of his employer as to be a managerial employee within the Board's definition. But a high degree of independence from management may well produce the opposite result, notwithstanding the degree of influence which may result from active and regular participation in governance matters.

In addition to misconstruing the significance of faculty independence from management, the court below also

failed to deal adequately with other implications of the faculty's status as professional employees. Certainly it is true, as the court held, that the faculty's professional status "does not preclude their classification as supervisory or managerial employees." (Pet. App. A, 25a) But having said that, it remains to determine whether the faculty's collective impact on management, which is undeniably as significant at Yeshiva as it is at many other institutions of higher education, is an incident of their professional status; or rather whether it aligns them with management to an extent sufficient to render them managerial employees. Even were their independence from management less marked, it is impossible to construe the faculty governance role at Yeshiva as other than an extension of their professional responsibilities. We show this more fully immediately below.

The court below conceded as virtually self-evident the faculty member's "authority to determine the content of his course, the method he employs in teaching it, and the evaluation of his students' academic performance" and held that "these attributes of professionalism should not characterize them as managerial or supervisory." (Pet. App. A, 26a) But the court failed to take the necessary next step and consider whether the areas in which faculty recommendations were found to be influential are not simply natural extensions of their interest in fulfilling their professional responsibilities. This was a critical omission. For surely if the faculty's recommendations in governance matters are logical extensions of their professional interests, then the circumstance that these recommendations are generally followed by management cannot serve as a basis for robbing faculties of their rights as professional employees to coverage under the Act. Advice is no less advice when it is taken.

Consideration of the areas of faculty influence at Yeshiva leads almost inescapably to the conclusion that the faculty participation in governance matters is an

incident of their status as professionals. Certainly, for example, the faculty's collective interest in the establishment of admission and degree requirements is a logical extension of their acknowledged individual authority over the "evaluation of [their] students' academic performance." (Pet. App. A, 26a) Yet the court below appears to have held that the faculty's influence over admission and degree requirements is among the factors which render them managerial employees.

Similarly, the court below appears to have attached considerable significance to the fact that the faculty participation in decisions regarding the retention of marginal students can result in a tuition loss when a student is dropped pursuant to a faculty recommendation. (Pet. App. A, 8a) But the budgetary significance of this faculty activity—which is clearly related to their general authority to evaluate students—is of no more significance than the decision of a faculty member to employ a certain textbook or to use laboratory facilities to teach a course. These are decisions which also have marked budgetary significance, but which the court below conceded would not render them managerial employees.[14]

The same is true of the faculty's natural interest in the University's curriculum and the consequent reliance of the administration and governing board on faculty advice in this area. Certainly the faculty, more than any other component of the university community, knows what it can teach and what is worth teaching. And obviously the formulation of the curriculum is central to their professional concerns, quite apart from their unique expertise. The court of appeals did not recognize this,

[14] *Cf. Western Electric Co.*, 100 N.L.R.B. 420, 422 (1952) where the Board held that an employer's stock maintainers were not managerial employees, though their performance was critically important, and their recommendations, or errors in their judgments, could easily impose a substantial cost on the employer.

but held that the faculty's influence over curriculum matters is also among the factors which render them managerial employees.

The court's treatment of the Board's "collective authority" doctrine is similarly flawed. The court acknowledged that the language of section 2(11), referring as it does to authority exercised by "any individual", lends firm support to the Board's conclusion that authority exerted collectively is not the type contemplated by the statutory exclusion. Pet. App. D, 69a-70a. See also, *e.g.*, *Adelphi University*, 195 N.L.R.B. 630, 648 (1972). The court below also recognized that reliance on collective authority to support a finding of supervisory status results also in a finding that the employees in question are supervising each other—clearly a tenuous interpretation of § 2(11). *Cf. Illinois State Journal Register* v. *NLRB*, 412 F.2d 37 (7th Cir. 1969); *Mourning* v. *NLRB*, 559 F.2d 768 (D.C. Cir. 1977). The court avoided this hurdle by holding that, in any event, there is nothing to *preclude* a finding that collective authority results in managerial status, even if it cannot support a finding of supervisory status. (Pet. App. A, 31a-32a) This is true enough. But the fact that true managerial authority may be exercised on a collective basis does not mean that collective participation in managerial decisions *necessarily* renders the participants managerial employees. And, as we have shown, the character of faculty participation in governance matters at Yeshiva is not such as to produce the "alignment with management" necessary to a finding of managerial status.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WOODLEY B. OSBORNE
1 Dupont Circle, N.W.
Washington, D.C. 20036

Attorney for American Association
of University Professors
Amicus Curiae

APPENDIX

APPENDIX

This appendix is comprised of representative provisions from collective bargaining agreements covering bargaining units consisting chiefly of full-time faculty at privately supported institutions of higher education. Part I contains provisions relating to faculty participation in what are generally referred to as matters of academic governance: curriculum, degree requirements, admission requirements, the grading system, teaching loads and budgetary matters. Part II summarizes provisions relating to faculty participation in matters relating to faculty status: initial appointments, reappointments, promotion and tenure.

The full texts of the agreements cited in this Appendix are available through the Bureau of National Affairs, Washington, D.C. or the National Center for the Study of Collective Bargaining in Higher Education, 155 East 24th Street, New York, New York.

Except where otherwise indicated, each of the bargaining relationships covered by this Appendix was established following an NLRB-conducted election.

I. GENERAL "GOVERNANCE" PROVISIONS

Fairleigh Dickinson University (New Jersey)—

> The Agreement establishes faculty "governance" committees on departmental, college and campus levels charged with advising the administration on a wide range of matters of educational policy. For example, the Agreement creates, for each college, a College Educational Planning Committee which is, among other things, "to engage in short-term and long-term planning for the college," review curricular recommendations, and "propose educational policies, college-

wide academic standards and requirements, admissions standards, and criteria and standards for honors work within the college . . ." (Article 11)

The Agreement also provides for a campus-wide faculty Committee on Buildings and Grounds, which, among other things, is to "participate in the planning and development of new building construction and major alternatives to existing buildings and grounds." (§ 8.86)

The Agreement provides for faculty participation in the selection of administrators, up to and including the President. (Article 14)

The Agreement provides for the establishment of a "University Commission," made up largely of faculty members, when, "in the view of the President, the University's problems are of such magnitude and complexity as to be inappropriate for examination by any college or campus planning agency. . ." (Article 17)

Adelphi University—

The Agreement provides that the faculty Constitution "shall provide continuance of existing rights, privileges, and responsibilities of the faculty to participate directly through the Senate in its own governance and in the initiation of the decisions on educational policy and standards within the University." (Article VI)

Antioch College School of Law—

The Agreement gives faculty non-voting representation on the Board of Trustees (Article XXII)

Ashland College (Ohio)—

The Agreement creates a joint Board of Trustees/faculty committee to assess the college's financial condition. If reductions in faculty positions are deemed necessary, the agreement requires prior consultation with the faculty senate.

Dowling College [1] (New York)—

Faculty are responsible under the Agreement for making recommendations regarding the operating budget and course offerings of their respective divisions. A joint faculty-administration senate has "full authority and responsibility" to determine admissions policies, approve the granting of degrees, award sabbatical leaves, approve the curriculum, and to establish the policy regarding the disbursement of financial aid and scholarship funds. (Article III)

Marymount College (New York)—

The Agreement states that the College Board of Trustees and President "are aware of the necessity for involving faculty in genuine participation in decisions covering educational policy . . . [and recognize] the necessity of faculty participation in educational policies which the faculty will be largely responsible for implementing."

Noting that the Board and President "reserve the right of veto on all matters," the Agreement establishes the "President's Council," consisting of the President, two deans, four faculty members and three students. The Council is to make

[1] This bargaining relationship was established by voluntary recognition.

recommendations regarding the instructional budget, long range planning, tuition and fees and the College's several goals and priorities. (B2.31)

Rider College [2] (New Jersey)—

The Agreement establishes faculty committees on the school and college level with the responsibility to "develop academic policy proposals on such items as curriculum, graduation requirements, . . . and other matters of an academic nature traditionally handled by the faculty . . ." (Article XI)

St. John's University [3] (New York)—

The Agreement provides that the "faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. . . . The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy." (Article II)

The Agreement provides for faculty participation in the selection of deans. (Article VIII) The Agreement expressly provides that either the faculty or the administration may "initiate action" to eliminate or reduce academic programs or departments with ultimate authority residing in the Board of Trustees. (Article XIX)

---

[2] This bargaining relationship was established by voluntary recognition.

[3] This bargaining relationship was established after an election conducted pursuant to the provisions of New York's "little Wagner Act."

University of Detroit—

The Agreement requires prior consultation with faculty prior to any decision to reduce the number of faculty positions. (Article VII)

University of Dubuque—

The Agreement establishes a "Program Development Committee," consisting of three faculty members, the Dean and one student, to make recommendations to the Dean regarding curriculum, teaching assignments and new degree programs. (Article 33)

The Agreement also establishes a similarly constituted "Institutional Advancement Committee" which is to consult with the University administration regarding budgetary decisions, proposals to reduce faculty positions and significant capital improvement programs. (Article 35)

Utica College of Syracuse University—

The Agreement establishes a curriculum committee, consisting of five faculty members, one librarian and one administrator, to recommend course changes, credit hour changes and standards and policies governing all permanent courses and curricula. (Article VIII)

The Agreement establishes an "Academic Standards Committee," consisting of six faculty members, which makes recommendations to the President regarding admission and degree requirements. (Article VIII)

Wagner College (New York)—

The Faculty Handbook, incorporated by reference into the Agreement, provides for a "Faculty Council," consisting of nine faculty members

and the President and Academic Vice President, *ex officio*, with responsibilities to oversee and evaluate the academic program, receive and evaluate reports of faculty committees, and "act as a channel of communication between the administration and the faculty in regard to the framing and execution of long-range plans, basic decisions regarding existing and prospective physical resources, and budgetary matters." The Faculty Handbook also provides for faculty committees with responsibilities over, among other things, admission policies, grading policies, degree requirements, curriculum, and faculty workload.

Bard College (New York)—

The Agreement provides that "the existence of a financial exigency which may warrant the termination of a continuous appointment shall be determined by the mutual agreement of the President and the Executive Committee of the [faculty union]." (Article VII)

University of Bridgeport—

The Agreement provides for the creation of a "University Productivity Committee," consisting of three people appointed by the President and three by the faculty union. The Committee is to review and approve "productivity" plans submitted to it by the colleges within the University. (Article 9)

The Agreement further provides that "[t]he University shall not implement any personnel decision affecting a member of the bargaining unit which is made for financial reasons unless the decision is pursuant to a college plan approved by the UPC." (Article 9)

II. CLAUSES GOVERNING DECISIONS RELATING TO FACULTY STATUS

Antioch College School of Law—

Initial appointments to faculty positions are not to be made without "prior approval by a majority vote of the faculty." (Article XIII)

Bloomfield College (New Jersey)—

Initial appointments to faculty positions are not to be made without approval of a majority of the faculty members in the candidate's discipline. Faculty to play "the major role" in all decisions relating to faculty status. (Article V)

Dowling College (New York)—

The faculty, through division coordinators, are responsible for making recommendations regarding the hiring of full and part-time faculty. (Article III)

Hofstra University—

The Agreement establishes detailed procedures whereby faculty, through a committee structure, make recommendations to the University administration regarding the appointment, reappointment, promotion and tenuring of faculty. The Agreement further requires the administration to give "great weight" to such recommendations. (Article VI)

Long Island University (Brooklyn Center)—

The Agreement provides that "[t]he responsibility for evaluating the credentials and performance of faculty members and for determining their eligibility for appointment, reappoint-

ment, promotion, and tenure rests principally with the faculty." The Agreement further provides that "the recommendations of the Faculty Review Committee will be followed except for compelling reasons . . ." With regard to initial appointments, the agreement provides that "all applicants for available . . . faculty positions shall be reviewed and approved by a majority of the qualified voters of the department . . ." (Article VII)

Loretto Heights College (Colorado)—

The Agreement creates a Standing Committee on Tenure which is to make recommendations to the College President regarding candidates for tenure. The President must state his reasons in the event of disagreement with the Committee and meet with it, if requested, to discuss those differences (Article V)

Marymount College (New York)—

The Agreement establishes a faculty rank and tenure committee charged with reviewing and making recommendations regarding matters of promotion, tenure, emeritus status, and sabbatical leaves. (Article A1)

New York Institute of Technology [4]—

With regard to initial appointments to faculty positions, the agreement provides that a Departmental Personnel Committee "shall conduct the search for and the evaluation of applicants . . ." (Article XI) These Committees are also responsible for making recommendations regarding reappointment and promotion decisions. (Article XII)

[4] This bargaining relationship was established following an election conducted under the provisions of New York's "little Wagner Act."

Rider College [5] (New Jersey)—

The Agreement establishes a Promotion and Tenure Committee made up of an equal number of administrators and tenured faculty members. This Committee receives departmental recommendations on promotion and tenure decisions and forwards its own recommendations to the College's Board of Trustees. Both the Committee and the Board of Trustees are enjoined not to "arbitrarily sustitute their judgments on the professional expertise of the candidate for properly documented judgments presented in the departmental recommendation." (Article VI)

St. John's University [6] (New York)—

The Agreement provides that initial appointment decisions are to be made by the departmental personnel and budget committee. (§ 5.1) Where the President wishes to "infuse new life into a department," he may designate the desired qualifications and, on the failure of the departmental committee to recommend an acceptable candidate, the President may make the appointment himself. (§ 5.5)

University of Bridgeport—

The Agreement provides that "[s]ubject to review by the President of the University, the faculty shall have primary responsibility with regard to all academic appointments, renewals or non-renewals of such appointments, promotion, and tenure. On such matters, the President shall concur with the faculty judgments

[5] See note 2, *supra*.

[6] See note 3, *supra*.

except in rare instances and exceptional circumstances for compelling reasons written in detail which shall not be arbitrary nor capricious." (Article 8)

University of Detroit—

The Agreement provides for the creation of a Faculty Status and Promotion Committee with responsibility for making recommendations to the administration concerning promotion and tenure decisions. (Appendix A)

Lowell Technological Institute—

Initial appointments to faculty positions are to be made by recommendation of the faculty. When recommendations are rejected, the process is repeated. (Article E) The Agreement also provides for the establishment of a Faculty Tenure Committee to make recommendations to the President regarding "tenure and removal from position." (Article D)

Utica College of Syracuse University—

The Agreement establishes a Faculty Affairs Committee to make recommendations regarding promotion, tenure, and reappointment decisions. In the event of irreconcilable differences between the Committee and the College President, both recommendations are submitted to the University Chancellor for final decision. (Article VIII)

Fairleigh Dickinson University (New Jersey)—

The Agreement sets forth detailed and elaborate structure of faculty committees charged with responsibility for making and reviewing recommendations regarding appointment, reappointment, promotion and tenure (Articles 10, 11)